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Affin Bank Bhd v Eye Bee Sdn Bhd

HIGH COURT (MELAKA) — COMPANIES WINDING UP NO MT1–28–47 OF 2004
LOW HOP BING J
B 28 JUNE 2005

Companies and Corporations — Winding up — Application to strike out winding up petition — Whether abuse of process — Whether judgment debtor had notice that judgment creditor had been replaced — Whether estoppel applied

C The petitioner was Affin Bank Bhd ('Affin'). BSN Commercial Bank (M) Bhd ('BSN') had on 19 October 2000 vide Kuala Lumpur Civil Suit D7–22–1332 of 2000 ('the Kuala Lumpur suit') obtained judgment ('the judgment')against, *inter alia* the respondent. On 26 April 2001 vide the Kuala Lumpur suit, BSN obtained an order that the judgment creditor BSN be replaced by Affin, the
D petitioner. The respondent sought an order that the petitioner's petition be struck out with costs on the grounds that: (1) the petitioner was not known to the respondent and hence had no *locus standi* to present the petition; and (2) the sum claimed in the petition was not in accordance with the terms of the judgment. The respondent's counsel elaborated that Affin was not the correct
E creditor and so the petition was an abuse of the process of the court.

The petitioner submitted that after having obtained the judgment, BSN as the judgment creditor had applied and obtained an order on 26 April 2001 in the Kuala Lumpur suit wherein the petitioner Affin had replaced BSN as the
F judgment creditor. The petitioner also relied on a vesting order obtained by BSN in favour of Affin. It was argued for the respondent that the vesting order was not stated in the petition and so could not be rectified by the affidavit. The respondent also said that the sum claimed in the petition and the statutory notice was unlawful and bad in law.

G **Held**, dismissing respondent's application with costs:

(1) There could be no doubt that the respondent actually knew and had notice that the judgment creditor BSN had been replaced by Affin as such, in which case the respondent was estopped from denying Affin as
H the judgment creditor (see para 14). Further, the respondent's affidavit had not disputed nor denied the statutory notice. Hence, the respondent must be taken to have accepted it (see para 15).

(2) The court must not go beyond the allegation of facts in the petition for the purposes of whether to grant or dismiss it (see para 21). However,
I reverting to the petition, it was to be noted that paras 5, 6 and 7 of the petition did clearly set out the debt due by the respondent to the petitioner which was further confirmed by the vesting order in which BSN's rights

including rights in all proceedings such as the instant petition had been vested in Affin. That being the case, there could be no doubt that the petition had condescended upon the necessary particulars indicating that the respondent was debtor while the petitioner was the creditor under s 217. Indeed, Affin being the judgment creditor of the respondent had the necessary *locus standi* in law and in fact to file this petition qua such creditor. The petition was far from being an abuse of the process of the court (see para 22).

(3) The respondent had never before the presentation of the petition disputed the computation of interest and the amount claimed in the statutory notice. Further, the respondent's application to set aside the judgment had already been dismissed not only by the learned registrar but also, on appeal, by the judge in chambers (see para 25). The doctrine of estoppel applied to respondent's conduct so that the respondent was estopped from denying the sum stated by the petitioner in the statutory notice and the petition pursuant to the judgment (see para 27).

[**Bahasa Malaysia summary**

Pempetisyen adalah Affin Bank Bhd ('Affin'). BSN Commercial Bank (M) Bhd ('BSN') telah pada 19 Oktober 2000 melalui Guaman Sivil Kuala Lumpur No D7–22–1332 tahun 2000 ('guaman Kuala Lumpur') memperoleh penghakiman ('penghakiman tersebut') terhadap, antara lain, responden. Pada 26 April 2001 melalui guaman Kuala Lumpur itu, BSN memperoleh satu perintah agar pemiutang penghakiman BSN digantikan dengan Affin, pempetisyen. Responden memohon satu perintah agar petisyen pempetisyen dibatalkan dengan kos atas alasan bahawa: (1) pempetisyen tidak dikenali oleh responden dan justeru itu tidak mempunyai *locus standi* untuk mengemukakan petisyen itu; dan (2)jumlah yang dituntut dalam petisyen tidak menurut terma penghakiman. Peguam responden menyatakan bahawa Affin bukan pemiutang yang betul dan oleh itu petisyen itu satu penyalahgunaan proses mahkamah.

Pempetisyen berhujah bahawa selepas memperoleh penghakiman, BSN sebagai pemiutang penghakiman telah memohon dan memperoleh satu perintah pada 26 April 2001 dalam guaman Kuala Lumpur itu di mana pempetisyen Affin telah digantikan dengan BSN sebagai pemiutang penghakiman. Pempetisyen juga bergantung kepada perintah yang berkuatkuasa yang diperoleh oleh BSN menyebelahi Affin. Ia dihujahkan bagi pihak responden bahawa perintah yang berkuatkuasa tidak dinyatakan dalam petisyen tersebut dan oleh itu tidak boleh dipinda oleh afidavit. Responden juga menyatakan bahawa jumlah yang dituntut dalam petisyen itu dan notis statutori adalah tidak sah dan salah disisi undang-undang.

Diputuskan menolak permohonan responden dengan kos:

(1) Tidak diragui bahawa responden sebenarnya mengetahui dan menyedari yang pemiutang penghakiman BSN telahpun digantikan oleh Affin maka dalam keadaan sedemikian responden diestopkan daripada menafikan Affin sebagai pemiutang penghakiman (lihat perenggan 14). Tambahan pula, afidavit responden tidak mempertikaikan maupun menafikan notis statutori. Justeru itu, responden dianggap telah menerimanya (lihat perenggan 15).

(2) Mahkamah tidak boleh melampaui pengataan fakta dalam petisyen tersebut bagi tujuan sama ada untuk membenar atau menolaknya (lihat perenggan 21). Namun, berdasarkan petisyen itu, hendaklah diteliti bahawa perenggan-perenggan 5, 6 dan 7 petisyen itu dengan jelas menyatakan hutang yang perlu dibayar oleh responden kepada pempetisyen yang juga disahkan oleh perintah yang berkuatkuasa yang mana hak-hak BSN termasuklah hak-hak dalam semua prosiding seperti dalam petisyen semasa terletak pada Affin. Oleh demikian, tidak diragui bahawa petisyen itu yang berdasarkan butiran yang perlu menujukkan bahawa responden adalah penghutang sementara pempetisyen adalah pemiutang di bawah s 217. Bahkan, Affin yang merupakan pemiutang penghakiman responden mempunyai *locus standi* yang diperlukan di sisi undang-undang dan fakta untuk memfailkan petisyen ini sebagai pemiutang. Petisyen tersebut jauh sekali merupakan satu penyalahgunaan proses mahkamah (lihat perenggan 22).

(3) Responden tidak pernah sebelum representasi petisyen mempertikaikan pengiraan faedah dan jumlah yang dituntut dalam notis statutori. Tambahan pula, permohonan responden untuk mengetepikan penghakiman telahpun ditolak bukan sahaja oleh pendaftar yang bijaksana tetapi juga, dalam rayuan, oleh hakim dalam kamar (lihat perenggan 25). Doktrin estopel terpakai ke atas perlakuan responden agar responden diestopkan daripada menafikan jumlah yang dinyatakan oleh pempetisyen dalam notis statutori dan petisyen menurut penghakiman tersebut (lihat perenggan 27).]

Notes

For cases on application to strike out winding up petition, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 875–876.

Cases referred to

Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd [1986] 1 MLJ 382 (refd)
Bandar Builder Sdn MM & Ors v United Malayan Banking Corp Bhd [1993] 3 MLJ 36 (refd)
Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331 (refd)

Datuk Ir Che Amran Mohd Yusoff v Yayasan Melaka & Ors [2003] MLJU 7 (refd)
Fildes Bros Ltd, Re [1970] 1 All ER 923 (refd)
Honan Plantations Sdn Bhd v Kerajaan Negeri Johor & Anor [1998] 2 MLJ 498 (refd)
Jurupakat Sdn Bhd v Kumpulan Good Earth (1973) Sdn Bhd [1988] 3 MLJ 49 (refd)
Lundie Brothers Ltd, Re [1965] 2 All ER 692 (refd)
Mageleine Investments Pte Ltd v Swiss Levingvton (Property Consultants) Pte Ltd [1990] 1 CLJ 395 (refd)
Mooney & Ors v Peat, Marwick, Mitchell & Co & Anor [1967] 1 MLJ 87 (refd)
Ooi Bee Tat @ Ooi Bee Lee v Ooi Bee Tat & Sons Sdn Bhd & Anor [1999] 5 MLJ 10 (refd)
Roslan bin Abdullah v New Zealand Insurance Co *Ltd* [1981] 2 MLJ 324 (refd)
S Manickam & Ors v Ismail bin Mohamed & Ors [1997] 2 MLJ 90 (refd)
Seng Huat Hang Sdn Bhd & Ors v Chee Seng & Co Sdn Bhd [1987] 1 MLJ 413 (refd)
Tan Yar Joo @ Chan Yik Yee v Sin Yee Estate Sdn Bhd [1995] MLJU 407 (refd)
United Malayan Banking Corp Bhd v Palm & Vegetable Oils (M) Sdn Bhd & Ors [1983] 1 MLJ 206 (refd)

Legislation referred to

Companies Act 1948 [UK] ss 210, 222
Companies Act 1965 ss 217(1)(b), 218
Rules of the High Court 1980 O 8 r 19(1)(d), O 14

Peter Gan (Lum Chee Seng & Associates) for the respondent.
Sharifah Shewikar Alhabshi (Taye &Co) for the petitioner.

Low Hop Bing J:

I APPLICATION

[1] Enclosure (29) before me was filed by the respondent seeking an order that the petitioner's petition in encl 2 filed on 24 August 2004 be struck out with costs pursuant to O 18 r 19(1)(d) of the Rules of the High Court 1980 or the inherent jurisdiction of the court.

II FACTUAL BACKGROUND

[2] The petitioner herein is Affin Bank Berhad ('Affin'). BSN Commercial Bank (M) Bhd ('BSN') has on 19 October 2000 vide Kuala Lumpur Civil Suit D7–22–1332 of 2000 ('the Kuala Lumpur suit') obtained judgment against, *inter alia* the respondent in the sum of RM4,581,013.79 together with further interest at 2.5%pa above the base lending rate (at 6.8%pa) calculated on monthly rests with effect from 31 March 2000 until full realisation, and penalty interest of 1% on the above prescribed rates in the event of late payments ('the judgment').

[3] On 26 April 2001 vide the Kuala Lumpur suit, BSN has obtained an order that the judgment creditor BSN be replaced by Affin the petitioner.

[4] As at 31 May 2004, the judgment sum amounted to RM6,375,661.06.

[5] On 21 June 2004, BSN through its solicitors served a statutory notice under s 218 of the Companies Act 1965 on the respondent's registered office demanding payment by the respondent of the aforesaid judgment sum within 21 days thereof, but the respondent has failed to do so.

[6] A reference hereinafter to a section is a reference to that section in the Companies Act 1965 unless the context otherwise requires.

[7] The respondent's grounds of application were set out by the affidavit in support affirmed by the respondent's executive director who stated*, inter alia* that:

(1) the petitioner was not known to the respondent and hence has no *locus standi* to present the petition; and

(2) the sum claimed in the petition was not in accordance with the terms of the judgment.

III LOCUS STANDI

[8] Learned counsel Mr Peter Gan elaborated for the respondent that Affin is not the correct creditor under s 217(1)(b), and so the petition herein is an abuse of the process of the court, relying on *Jurupakat Sdn Bhd v Kumpulan Good Earth (1973) Sdn Bhd* [1988] 3 MLJ 49; and *Tan Yar Joo @ Chan Yik Yee v Sin Yee Estate Sdn Bhd* [1995] MLJU 407.

[9] In response, learned counsel Ms Sharifah Shewikar Alhabshi contended for the petitioner that after having obtained the judgment, BSN as the judgment creditor had applied by way of summons in chambers and obtained an order on 26 April 2001 in the Kuala Lumpur suit wherein the petitioner Affin has replaced BSN as the judgment creditor. The relevant summons in chambers had been served on the respondent. The respondent has not objected to the application. The respondent has also not replied to the petitioner's affidavit in support. Reliance was sought in *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382; and *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331.

[10] The petitioner also relied on a vesting order obtained by BSN in favour of Affin.

[11] It is clear to me that the submissions raised for the respondent is purely technical in nature. The answer is to be found in the above factual background which is otherwise simple and straightforward.

[12] In *Jurupakat Sdn Bhd* there was no judgment debt. The question for the court to decide was whether the petitioner was a creditor who could file a petition to wind-up the respondent. Zakaria Yatim J (later FCJ) held that the petitioner was not a creditor as envisaged in s 217 and so had no *locus standi* to file the petition which was an abuse of the process of the court. The facts revealed in that authority are obviously distinguishable from those in the instant petition.

[13] It is noteworthy that the statutory notice has referred to the judgment creditor as 'BSN Commercial Bank (M) Bhd now known as Affin Bank Bhd'.

[14] In my judgment, there can be no doubt that the respondent actually knew and had notice that the judgment creditor BSN has been replaced by Affin as such, in which case the respondent is estopped from denying Affin as the judgment creditor: *Boustead Trading* (FC). I shall delve into this issue later in my judgment.

[15] The respondent's affidavit has not disputed nor denied the statutory notice. Hence, the respondent must be taken to have accepted it: *Alloy Automotive* (SC) at p 385I right per Lee Hun Hoe CJ (Borneo) (as he then was).

IV VESTING ORDER

[16] It was argued for the respondent that the vesting order was not stated in the petition and so cannot be rectified by the affidavit, on the authority of *United Malayan Banking Corp Bhd v Palm & Vegetable Oils (M) Sdn Bhd & Ors* [1983] 1 MLJ 206; *Re Lundie Brothers Ltd* [1965] 2 All ER 692; and *Re Fildes Bros Ltd* [1970] 1 All ER 923.

[17] An analysis of the authorities cited for the respondent would crystallise the strength or weakness of the respondent's contention.

[18] In *United Malayan Banking Corp Bhd* the plaintiffs statement of claim was inadequately pleaded as it did not state, *inter alia* that the defendants had in fact, as security for the credit facilities to be given to the first defendant, lodged with the plaintiff shares under four memoranda of deposit of shares and power of attorney in its favour. These matters were only disclosed for the first time in the affidavit in support of the O 14 summons. In this regard, Raja Azlan Shah LP (now HRH the Sultan of Perak) speaking for the Federal Court held that any defect or omission in the statement of claim cannot be made good by affidavit evidence. There was no winding up petition before the Federal Court.

[19] Plowman J in *Lundie Brothers* at p 699E held, *inter alia*, that it would be wrong for the court to travel outside the allegations in the petition for relief under s 210 of the English Companies Act 1948; alternatively for an order under s 222 thereof for the winding-up of the company. *Lundie Brothers* was followed in *Re Fildes Bros Ltd* by Megarry J.

[20] The petitioner in *Tan Yar Joo* petitioned to wind-up the respondent, but the petition did not state the capacity in which the petitioner was making the petition. The petitioner subsequently filed a second affidavit stating that he was a contributory holding 88,000 shares in the respondent. Kang Hwee Gee JC (now J) struck out the petition.

[21] In my view, proposition of law established in the judgments in *Tan Yar Joo*; *Lundie Brothers* and *Re Fildes Bros* was that the court must not go beyond the allegation of facts in the petition for the purposes of whether to grant or dismiss it.

[22] However, reverting to the instant petition, it is to be noted that paras 5, 6 and 7 of the petition did clearly set out the debt due by the respondent to the petitioner which is further confirmed by the vesting order in which BSN's rights including rights in all proceedings such as the instant petition had been vested in Affin. That being the case, there can be no doubt that the petition has condescended upon the necessary particulars indicating that the respondent is debtor while the petitioner is the creditor under s 217. Indeed, Affin being the judgment creditor of the respondent has the necessary *locus standi* in law and in fact to file this petition *qua* such creditor. The petition herein is far from being an abuse of the process of the court.

V SUM CLAIMED BY PETITIONER

[23] The next submission for the respondent is that the sum claimed by the petitioner in para 5 of the petition and the statutory notice is unlawful and bad in law.

[24] The contention for the petitioner is that the sum claimed is a reflection of the true position.

[25] I would not risk any repetition of the above factual background, in particular the judgment sum which provided for the ground of the instant petition. It suffices for me to state that the respondent has never before the presentation of the instant petition disputed the computation of interest and the amount claimed in the statutory notice. Further, the respondent's application to set aside the judgment has already been dismissed not only by the learned registrar but also, on appeal, by the judge in chambers. In the circumstances, the petitioner is clearly entitled to raise the doctrine of estoppel against the respondent.

[26] In *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331, the Federal Court speaking through the judgment of Gopal Sri Ram JCA held, *inter alia*, that:

(1) the doctrine of estoppel is a flexible principle of wide utility which must be applied in a broad and liberal fashion;

(2) the doctrine is available not only to defendants but plaintiffs too may have recourse to it;

(3) the doctrine is not confined to cases where a representation of fact has been made, or where a party has been encouraged by another to believe in the existence or non existence of a fact as representations of law are also covered; and

(4) the doctrine can be applied where the encouragement being offered by the party sought to be estopped comes in the form of silence.

[27] In my view, the doctrine of estoppel applies to respondent's conduct so that the respondent is estopped from denying the sum stated by the petitioner in the statutory notice and the instant petition pursuant to the judgment.

[28] Illustrations from some salient judgments would assist in putting the respondent's argument in proper perspective.

[29] In *Malayan Banking Bhd v Red Max (M) Bhd* [2000] 6 CLJ 21, the respondent had never denied nor disputed the debt from 19 September 1997 to 8 June 1998, but only did so when the respondent served the notice of motion on the petitioner on 8 June 1998. Abdul Malik Ishak J followed *Mageleine Investments Pte Ltd v Swiss Levingvton (Property Consultants) Pte Ltd* [1990] 1 CLJ 395 and ruled in favour of the creditor.

[30] In my view, the facts of the case before me reveal that the terms of the judgment obtained by the petitioner against the respondent are clear and certain. The respondent cannot in the winding up court attempt to reopen an order or judgment which was final and binding, as the respondent's application is an abuse of the process of the court: see *Ooi Bee Tat @ Ooi Bee Lee v Ooi Bee Tat & Sons Sdn Bhd & Anor* [1999] 5 MLJ 10 per Jeffrey Tan J. Hence, I find the respondent's contention wholly untenable.

VI ORDER 18 RULE 19(1)(D)

[31] It is trite law that it is only in conspicuously unsustainable cases that a pleading generally and a claim specifically would be struck out under any limb of O 18 r 19(1) and such power would only be exercised by the court sparingly: see eg *Roslan bin Abdullah v New Zealand Insurance* Co *Ltd* [1981] 2 MLJ 324 (PC); *Datuk Ir Che Amran Mohd Yusoff v Yayasan Melaka & Ors* [2003] MLJU 7; *Seng Huat Hang Sdn Bhd & Ors v Chee Seng & Co Sdn Bhd* [1987] 1 MLJ 413 (HC); *Mooney & Ors v Peat, Marwick, Mitchell & Co & Anor* [1967] 1 MLJ 87 (HC); *Honan Plantations Sdn Bhd v Kerajaan Negeri Johor & Anor* [1998] 2 MLJ 498 (CA); *Bandar Builder Sdn MM & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 (SC); *S Manickam & Ors v Ismail bin Mohamed & Ors* [1997] 2 MLJ 90.

[32] In the light of my finding that the petition herein is not an abuse of the process of the court, O 18 r 19(1)(d) is utterly unhelpful to the respondent.

VI CONCLUSION

[33] On the foregoing grounds, I dismiss the respondent's application with costs.

Respondent's application dismissed with costs.

Reported by Loo Lai Mee